Nos. 80-1190 and 80-1193

In the Supreme Court of the United States

OCTOBER TERM, 1981

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PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC., PETITIONER

v.

LOUIS SWINT AND WILLIE JOHNSON, ETC.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

LOUIS SWINT AND WILLIE JAMES JOHNSON

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals applied proper criteria in determining that aspects of the seniority system in effect at Pullman-Standard's plant were not bona fide within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964.

2. Whether the court of appeals complied with Fed. R. Civ. P. 52(a) in reviewing the district court's findings.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
I. The court of appeals correctly determined that aspects of petitioners' seniority system were not bona fide	9
II. The test applied by the courts below identifies proper criteria for determining whether a seniority system is bona fide	17
A. Disproportionate impact	18
B. A history of discrimination	23
C. Business justification	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405	18, 25
Black & Decker Manufacturing Co., 147 N.L.R.B. 825	16
Brotherhood of Railroad Trainmen v. *Howard*, 343 U.S. 768	27, 28
California Brewers Association v. *Bryant*, 444 U.S. 598	10
Columbus Board of Education v. *Penick*, 443 U.S. 449	24
County of Washington v. *Gunther*, No. 80-429 (June 8, 1981)	18
Dayton Board of Education v. *Brinkman*, 443 U.S. 526	12
East v. *Romine, Inc.*, 518 F.2d 332	13
Dothard v. *Rawlinson*, 433 U.S. 321	18
Franks v. *Bowman Transportation Co.*, 424 U.S. 747	15, 22

Cases—Continued

	Page
Furnco Construction Corp. v. *Waters*, 438 U.S. 567	22
General Electric Co. v. *Gilbert*, 429 U.S. 125	19
Georgia Highway Express, 150 N.L.R.B. 1649	29
Globe Machine & Stamping Co., 3 N.L.R.B. 294	29-30
Gomillion v. *Lightfoot*, 364 U.S. 339	21
Griggs v. *Duke Power Co.*, 401 U.S. 429	18
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324	4, 15, 16, 18, 19, 29
James v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, cert. denied, 434 U.S. 1034	4, 26
Keyes v. *School District No. 1*, 413 U.S. 189	24
Mallinckrodt Chemical Works, 162 N.L.R.B. 387	29
McGinnis v. *Royster*, 410 U.S. 263	23
Miller v. *Continental Can Co.*, 26 Fair Empl. Prac. Cas. 151	20, 21
Myers v. *Gilman Paper Co.*, 25 Fair Empl. Prac. Cas. 468	20
NLRB v. *Chicago Health & Tennis Clubs*, 567 F.2d 331	16
Parke Davis & Co., 173 N.L.R.B. 313	29
Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256	19, 21
Sears v. *Bennett*, 645 F.2d 1365, petition for cert. pending *sub nom. United Transportation Union* v. *Sears*, No. 81-221	17, 27
Terrell v. *United States Pipe & Foundry Co.*, 644 F.2d 1112	17, 25-26, 28-29, 30
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63	15
United States v. *Board of School Commissioners*, 573 F.2d 400, cert. denied, 439 U.S. 824	19
United States v. *General Motors Corp.*, 384 U.S. 127	12
United States v. *Georgia Power Co.*, 634 F.2d 929, petition for cert. pending *sub nom. Local 84, IBEW* v. *United States*, No. 80-2117	2, 17, 20
United States v. *United States Gypsum Co.*, 333 U.S. 364	13
United States Pipe & Foundry Co.:	
19 N.L.R.B. 1016	30
84 N.L.R.B. 954	30

Cases—Continued Page

United Steelworkers of America v. *Weber*, 443 U.S. 193 ..... 12, 28
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252..12, 19, 21, 22, 23
Washington v. *Davis*, 426 U.S. 229 21
Wheeler-Van Label Co. v. *NLRB*, 408 U.S. 613, cert. denied, 396 U.S. 834 16

Constitution, statutes and rules:

United States Constitution, Fourteenth Amendment (Equal Protection Clause) 23
Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. III) 2000e *et seq.* 1, 2, 7
Section 703(e)(1), 42 U.S.C. 2000e-2(e)(1).. 18
Section 703(h), 42 U.S.C. 2000e-2(h).....1, 4, 7, 8, 9, 10, 11, 15, 17, 18, 19
Fed. R. Civ. P. 52 12
Fed. R. Evid. 404(b) 24

Miscellaneous:

110 Cong. Reg. 7243 (1964) 15

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INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission and the Attorney General have primary responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.* Under recent decisions of this Court, Section 703(h) of the Act, 42 U.S.C. 2000e-2(h) protects certain bona fide seniority systems from attack under Title VII. This case concerns the definition of "bona fide" for purposes of Section 703(h) and is therefore of substantial significance to the enforcement of Title VII. Several other cases presenting similar issues, in which the United States or the Equal Employment Opportunity Commission are parties or were amici below, either are before the Court or may be before

the Court shortly. See, *e.g.*, *United States* v. *Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), petition for cert. pending *sub nom. Local 84, IBEW* v. *United States*, No. 80-2117; *Sears* v. *Bennett*, 645 F.2d 1365 (10th Cir. 1981), petition for cert. pending *sub nom. United Transportation Union* v. *Sears*, No. 81-221; *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981).

STATEMENT

Respondents, black employees of petitioner Pullman-Standard, brought this action in 1971 in the United States District Court for the Northern District of Alabama. They charged that petitioner Pullman-Standard and petitioners United Steelworkers of America and its Local 1466 (USW) had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 1a-2a).[1] Respondents alleged, among other things, that the seniority system at Pullman-Standard's Bessemer, Alabama plant violated Title VII. The International Association of Machinists (IAM) was subsequently added as a defendant for purposes of injunctive relief (see J.A. 14-16, 29).

1. At the time the Bessemer plant was unionized, in 1941, there were approximately 20 operational departments, of which four were all-white and one was all-black (see J.A. 103). Each department comprised one or more jobs; jobs were segregated by race (see Pet. App. 39a). Job segregation continued past the effective date of Title VII (*id.* at 8a). Many other aspects of the organization of the plant reflected racial classifications and racial segregation (Pet. App. 39a; see page 6 & note 4, *infra*).

In 1941, the IAM sought to organize a craft unit within the plant, while a predecessor of the USW sought to represent all production and maintenance workers.[2]

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 80-1193.

[2] Other unions also made efforts to organize the plant, and the International Brotherhood of Electrical Workers represented a unit within the plant until 1946 (Pet. App. 36a, 41a).

After an election, the National Labor Relations Board certified the IAM to represent a unit similar, but not identical, to the unit which the IAM sought to represent. In particular, the IAM was designated to represent employees in the all-black Truck Department—which it had not sought to include in its unit—apparently because management testified before the NLRB that the Truck Department was functionally related to certain machinists' jobs (see J.A. 166, 130-131). The USW represented most of the other employees in the plant. The bargaining units sought by the IAM and designated by the NLRB required that certain departments be divided; for example, there were an IAM Die and Tool Department and a USW Die and Tool Department. The IAM Department consisted of all the white die and tool jobs; the USW Die and Tool Department was all black, except for one white. Similarly, the IAM unit split off all-white components from the Maintenance and Steel Erection Departments, which had been integrated. See Pet. App. 35a; J.A. 165-166, 167, 170-171, 243-251.

Shortly after the units were certified, the IAM and the USW, with the agreement of Pullman-Standard, exchanged certain job classifications. The IAM ceded all the jobs in its unit staffed by blacks to the USW; the USW ceded two jobs staffed by whites to the IAM. The result of this exchange was that the IAM's bargaining unit became all-white (see Pet. App. 12a, 41a-42a; J.A. 339-340; USW Br. 7a n.2). Several aspects of the seniority system that were determined by the 1941 certification and exchanges persisted at least until the time this suit was brought (see Pet. App. 118a n.5, 123a (IAM Maintenance (Millwrights), Truck, and IAM Die and Tool Departments)).

Seniority governed layoffs and recalls at all relevant times. From 1942 until 1947 and from 1954 until the Bessemer plant permanently closed in 1981, the USW collective bargaining agreement provided that seniority would be measured by the number of years an employee had been in a department (Pet. App. 40a-41a; J.A. 192,

194).[3] The USW agreements always provided that an employee forfeited his seniority when he voluntarily transferred from one seniority unit to another (Pet. App. 26a).

2. In 1974, the district court held that the seniority system did not violate Title VII (Pet. App. 138a). In 1976 the Fifth Circuit reversed (*id.* at 75a). While the case was pending before the district court on remand, this Court decided *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), holding that under Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-(2)(h), certain bona fide seniority systems did not violate Title VII even though they perpetuated the effects of past discrimination. The district court then ruled, after a brief hearing, that the Bessemer seniority system was bona fide and therefore did not violate Title VII (Pet. App. 23a-44a).

The district court took the position that only "the bona fides of the seniority system * * * between the company and the USW" were "under attack" (Pet. App. 35a); the IAM "seniority unit[]," it said, was "not directly at issue in this litigation" (*id.* at 26a & n.2). To determine whether the USW seniority system was bona fide the court considered (*id.* at 28a) the factors identified in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 352 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978):

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

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[3] From 1944 until 1981, the IAM agreement provided for occupational seniority (Pet. App. 26a-27a).

3) whether the seniority system had its genesis in racial discrimination; and

4) whether the system was negotiated and has been maintained free from any illegal purpose.

The district court concluded that the USW system satisfied the first *James* factor because it was "facially neutral"; moreover, the rules basing seniority on time in a department and providing for forfeiture upon transfer were "applied equally to all races" (Pet. App. 28a). The court stated that these rules "affect[ed] significant numbers of both white and black employees * * * in an identical manner" (*id.* at 29a). The district court expressly declined to determine whether black employees were confined to less desirable departments than whites (*id.* at 29a-30a).

The court construed the second *James* factor to mandate an inquiry "into rationality and industry practice" (Pet. App. 31a). The court compared the Bessemer system to seniority systems at other plants that manufactured railroad equipment, including two Pullman-Standard plants at which there were few blacks. It noted several instances in which single integrated departments in the other plants were divided into two segregated or nearly segregated departments at Bessemer, but explained that in almost every case the departments were divided in this way because the plant had been divided into separate bargaining units (*id.* at 34a-37a & n.19). The respondents' contention that certain departments should not have been divided when the bargaining unit was certified was characterized by the court as a "collateral attack on the NLRB decision * * * [that] must fail" (*id.* at 36a). The court added that because the USW had sought to include all the employees in its bargaining unit, and because Pullman-Standard had "adopted a 'hands-off' attitude on formulation of election units" (*id.* at 35a-36a), neither was "chargeable with responsibility" for the divided departments (*id.* at 37a). The court concluded that, taken as a whole, the

seniority units at Bessemer were rational and consistent with industry practice (*id.* at 32a, 37a-38a).

In discussing the genesis of the seniority system, the court found that discrimination was "pervasive[]" and "racial segregation was extensively practiced at the company's Bessemer plant, in the local union hall, and in the community as a whole" (Pet. App. 39a).[4] But the court ruled that "the seniority system under attack is essentially the product of USW aims and policies" (*id.* at 40a) and that the USW local, "[w]hile possessing some of the trappings taken from an otherwise segregated society * * * was one of the few institutions in the area which did not * * * serve[] the cause of segregation; rather, it served a joint interest of black and white workers" (*ibid.*; footnote omitted). The court also pointed to the significant number of blacks in the leadership and rank-and-file of the USW (see *id.* at 34a n.14, 43a).

The court expressly declined to make a finding on the motives of the IAM (Pet. App. 42a) because, it said, "[t]he predecessor of the USW sought to represent all workers, black and white, in the plant" and therefore "the USW cannot be charged with racial bias in its response to the IAM situation" (*ibid.*). The court also found, without elaboration, that Pullman-Standard had bargained without racial animus (*id.* at 43a).

The court considered the fourth *James* factor to be a composite of the others and concluded that "the system

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[4] The court further explained (Pet. App. 39a):

> Most of the jobs at the plant were by custom treated as "white only" or "black only" * * *. Bathhouses, locker rooms, and toilet facilities were racially segregated. Company records—including employee rosters, internal correspondence, records of negotiation sessions, lists of persons picketing—included racial designations. In 1941 some of the "mixed" jobs even had different wage scales for whites and blacks. All of the company's officials, supervisors and foremen were white. Union meetings were conducted with different sides of the hall for white and black members, and social functions of the union were also segregated.

under attack" was bona fide and therefore within the Section 703(h) exemption (Pet. App. 43a-44a).

3. The court of appeals, also invoking *James*, reversed. It emphasized the segregated departments that were created at the Bessemer plant—many of which had no counterparts in other Pullman-Standard plants (Pet. App. 11a, 12a). These departments, the court concluded, were "arbitrary creation[s]" supported by "no other considerations than the objective to separate the races"; they were, the court said, the result of the IAM's "obvious principal aim * * * to exclude black workers from its bargaining unit" (*id.* at 11a-15a). The court repeated the district court's account of both the pervasive discrimination that prevailed when the system was established and the USW's relative insulation from it, but criticized the district court for ignoring the IAM's motives (*id.* at 13a-14a, 14a-15a). It pointed to the IAM's "maneuvers," in which Pullman-Standard and the USW acquiesced, designed to bar blacks from its bargaining unit (*id.* at 15a-16a). "[T]he I.A.M. manifested an intent * * * selectively [to] exclude blacks from its bargaining unit, N.L.R.B. certification considerations notwithstanding" (*id.* at 14a), both at and after the time the plant was organized (see *id.* at 11a). Finally, the court noted that blacks were confined to the less remunerative seniority departments (*id.* at 10a, 14a). The court concluded that it was compelled to "reject[] the district court's finding that * * * the seniority system at Pullman-Standard is 'bona fide' within the meaning of § 703(h) * * *" (*id.* at 21a-22a). It ordered that the case be "remand[ed] to the district court for proceedings necessary to provide appropriate relief" (*ibid.*).

SUMMARY OF ARGUMENT

I. The court of appeals correctly determined that at the initiative of the IAM, certain aspects of the Bessemer plant's seniority system were designed to achieve racially segregative consequences, and were therefore not bona fide. For the most part, the court of appeals did

not specifically address the other aspects of the system, although its opinion can be read as proceeding on the erroneous premise that if certain aspects of a system are not bona fide no aspect of the system is protected by Section 703(h). This Court should consider the definition of "bona fide" only in the context presented by those aspects of the system that were affected by the IAM's maneuvers.

The court's determination that racial considerations affected certain aspects of the departmental arrangements was based essentially on documentary evidence that permitted no other conclusion, and was clearly correct. The district court's reliance on NLRB designation of the bargaining units misapprehends the Board's role and the significance of such a designation. That the IAM, as opposed to petitioners, may have been principally responsible for injecting the racial element may be relevant to fashioning relief, but it has no bearing on the question whether certain aspects of the system are not bona fide. That question is answered by the conclusion that race affected the design of the system, and that that design persisted past the effective date of Title VII.

II. Both the district court and the court of appeals applied, in effect, three criteria in assessing the bona fides of the seniority system. They considered whether the challenged aspects of the system had a disproportionate effect on minority employees; whether those who established the system had a history of engaging in racial discrimination; and whether there was a business justification for the challenged aspects. These are proper criteria to apply.

A. A disproportionate impact can support an inference that an aspect of a seniority system was influenced by considerations of race. Because the practice of segregating jobs was so prevalent, job classifications provided a ready surrogate for racial classifications; parties intending to discriminate could therefore avoid explicit racial classifications by treating blacks' jobs differently from whites' jobs. Thus the differences between the impact of a seniority system on blacks' jobs and its impact

on whites' jobs will often be the principal evidence of a covert racial classification.

B. A party's history of racial discrimination can also support the inference that aspects of a seniority system designed or supported by that party have a discriminatory purpose. If an employer or union consistently discriminates in other areas, such as hiring, transfer, or membership rules, there is no reason to presume that its contemporaneous support for seniority rules that severely disadvantage blacks is nondiscriminatory and undertaken for legitimate purposes. Moreover, where one party to a collective bargaining arrangement has a discriminatory purpose, the other party need not join in it; it is sufficient that the other party does not resist it or make concessions in an effort to obtain minority employees' freedom from discrimination, because that permits the discriminatory purpose to operate without hindrance.

C. A sufficient business justification can show that a feature of a seniority system is bona fide. Because it will often be difficult for a court fruitfully to inquire into the particular needs of the single plant in issue, it must sometimes consider industry practice. Industry practice, even where reflected in NLRB precedents, may, however, itself be affected by race, and must therefore be used with care. In this case, a comparison to the appropriate industry practices supported the court of appeals' holding that certain aspects of the seniority system were not bona fide.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT ASPECTS OF PETITIONERS' SENIORITY SYSTEM WERE NOT BONA FIDE

1. Petitioners, and to some extent respondents and the court of appeals as well, seem to proceed from the premise that a seniority system is either entirely bona fide or entirely unprotected by Section 703(h). In fact certain aspects of a seniority system may be bona fide while others are not. See *California Brewers Associa-*

tion v. *Bryant*, 444 U.S. 598, 610-611 (1980); see also *id.* at 607-608. For example, use of seniority as a criterion may be legitimate, but the particular seniority units may be determined on the basis of race; or some seniority units may be racially gerrymandered while others reflect proper business concerns.

Here, the court of appeals' analysis centered almost entirely on the IAM's role in affecting the design of certain departments. See, *e.g.*, Pet. App. 13a-14a (IAM's motives show that system originated in racial discrimination); *id.* at 14a, 15a-16a (IAM's discriminatory maneuvers created certain segregated departments); *id.* at 15a ("An analysis of the totality of the facts and circumstances * * * leaves us with * * * no doubt, based upon the record in this case, about the existence of a discriminatory purpose. The obvious principal aim of the I.A.M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached * * *."). The court found (*id.* at 15a-16a) that the IAM, to achieve its segregative purposes, brought about the gerrymandering of several departments at the Bessemer plant. The opinion appears to require that, on remand, the district court should remedy the effects of those features of the system which were attributable to the IAM's discriminatory actions.

Other aspects of the seniority system, however, may require no remedy. For example, the court's reasoning is entirely consistent with the position that Section 703(h) protected the operation of the Bessemer seniority system in certain departments that undoubtedly belonged in the USW unit, that served legitimate business objectives, that had close counterparts in other plants where race could not have been a factor, and that were unaffected by the IAM's maneuvers.

Certain passages in the court of appeals' opinion do suggest that the court intended to declare that no aspect of the seniority system was bona fide. Because the court's reasoning does not extend that far, however, we believe there is a basis for this Court to read the court of appeals' opinion narrowly, to hold only that certain

aspects of the system—those affected by the IAM's racially-motivated maneuvers—were not bona fide. We believe this holding is correct. To the extent that the court of appeals' holding may be read more broadly, however, we submit that this Court should recognize that it appears to be premised on the erroneous view that a seniority system is either entirely bona fide or entirely unprotected by Section 703(h). In particular, we believe this Court should not view the court of appeals' decision as a considered evaluation of the bona fides of each aspect of the Bessemer plant's seniority system. The Court should consider the question presented by this case—wh.n an aspect of a seniority system is bona fide under Section 703(h)—only in the context specifically addressed by the court of appeals; as we show in point II of this brief, pages 17-29, *infra*, the particular facts of a case may substantially affect the proper resolution of this issue. Therefore, in this case, we believe the Court should examine the criteria for determining when an aspect of a seniority system is bona fide only in the factual context presented by the IAM's maneuvers, and not in the context presented by the other aspects of the Bessemer plant's system.

2. The court of appeals was correct in determining that the IAM caused certain aspects of the seniority system to be based on race. It was also correct in holding that to the extent the system was affected by the IAM's discriminatory maneuvers, it was not protected by Section 703(h).

a. In 1941, the IAM first claimed a bargaining unit that appears to have included few or no blacks.[5] The NLRB believed that certain jobs held by blacks should be included in the unit, and designated a unit that con-

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[5] Petitioners emphasize the IAM's announcement at the NLRB hearing that it would "claim" "negro cranemen" in the Die and Tool and Wheel and Axle Departments (J.A. 149), but there were no black cranemen in those departments (see J.A. 247, 249).

tained several blacks. The IAM then ceded the blacks' jobs to the USW, making the IAM unit all white. These facts alone suggest that the IAM's actions were racially motivated.

In addition, the court of appeals had before it the IAM's "ritual," in effect until 1948, which limited membership to "qualified white candidates" (J.A. 348, 350), and the established history of racial discrimination by craft unions, of which the court could take judicial notice (see *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 198 n.1 (1979)). Moreover, there was evidence that the IAM sought to include in its unit white employees who did not hold skilled jobs (see J.A. 292; see also Resp. Br. 27-29 nn. 32-33); this undermined the IAM's claim that it was excluding the black workers only because of the nature of their jobs.

It appears that all of this evidence was documentary; the court of appeals therefore did not need to make credibility determinations in order to evaluate the IAM's reasons for manipulating the boundaries of its bargaining unit. See generally *United States* v. *General Motors Corp.*, 384 U.S. 127, 141-142 n.16 (1966). The district court had not made a contrary determination but simply declined to address the question. The court of appeals, upon examining the documentary evidence, saw "a clear pattern, unexplainable on grounds other than race" (*Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)), and accordingly had no reason to order a further remand on this issue. See *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534-535 n.8 (1979).[6]

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[6] The Court granted certiorari on the question whether the court of appeals was bound by the "clearly erroneous" standard of Fed. R. Civ. P. 52 in reviewing the district court's determination that the Bessemer seniority system was bona fide. While we are disposed to agree with much that respondents say about this issue (see Resp. Br. 136-151), we believe that the question is not properly presented by this case. At no point did the court of appeals explicitly apply a standard other than the "clearly erroneous" rule to the district court's conclusions. To the contrary, the central passage

b. The district court refused to consider the IAM's motives because, it said, the IAM was not a "real defendant," the IAM "system" was not "under attack," and the USW and Pullman-Standard were "not chargeable with responsibility for" what the IAM did (Pet. App. 35a, 36a, 37a); petitioners endorse this position.[7] These

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in its analysis of the district court's opinion recites (Pet. App. 15a):

> Having carefully reviewed the evidence offered to show whether the departmental seniority system in the present case is "bona fide" within the meaning of section 703(h) of Title VII, we reject the district court's finding.
>
> An analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made.

The "definite and firm conviction" standard is, of course, a restatement of the clearly erroneous rule. See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). At other points, where the court of appeals questioned the district court's most significant conclusions, it applied a standard that at least satisfied the clearly erroneous rule. See, *e.g.*, Pet. App. 9a ("[W]e are not satisfied that the court's ultimate conclusion is amply supported by the record evidence."); *id.* at 14a ("It is crystal clear that considerations of race permeated the negotiation and adoption of the seniority system * * *."); *id.* at 15a ("There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose."); *id.* at 16a ("No credible explanation has been advanced * * *."). In any event, the court of appeals' principal difference with the district court was over the legal question whether the IAM's motives were relevant at all. See *id.* at 13a-14a, 16a.

The court of appeals' only reference to a power to overturn district court findings occurs in the second paragraph of an abstract discussion in a footnote (Pet. App. 15a n.6) where the court merely cites *East* v. *Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975), a decision discussing this power, and then quotes a passage from that opinion. Petitioners seize on this passing reference (see, *e.g.*, USW Br. 26, 27, 31) to make the unwarranted assertion that the court of appeals claimed and exercised such a power without regard to the clearly erroneous standard.

[7] Petitioners insist (*e.g.*, USW Br. 23 n.38; 47-48; Pullman Br. 3) that the court of appeals was barred from considering the IAM's motives because respondents' pleadings put at issue only the

arguments misconceive the issue. The question before the court of appeals was whether, and to what extent, the seniority system at the Bessemer plant was bona fide. To the extent that racial considerations entered into the design of the seniority units, the system was not bona fide; Congress did not intend Section 703(h) to protect rules of a seniority system that were adopted not for some legitimate reason but in order to segregate the

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USW seniority system. The district court apparently shared this view (*e.g.*, Pet. App. 26a, 35a). The court of appeals, however, was not concerned about the internal operation of the IAM unit; the basis of its holding was that racial considerations caused certain jobs to be shifted from the IAM unit to the USW unit. There is no reason why the contention that jobs were shifted from one unit to another for impermissible reasons can be raised only as a claim about the IAM system and is not comprehended in a claim about the USW system. Moreover, respondents added the IAM as a defendant (although not seeking damages from the IAM, apparently because they had not met the administrative requirements for seeking damages; see Pet. App. 68a n.4) because "the relief requested may involve or infringe upon the provisions of [the IAM's] collective bargaining agreement with the Company" (J.A. 29). The IAM, which was represented by counsel for the USW (J.A. 41), answered, denying that it had discriminated against "any * * * black employee of Pullman-Standard" (J.A. 27). In addition, the court of appeals' first remand instructed the district court to consider whether blacks were systemically excluded from the IAM unit (Pet. App. 96a).

Petitioners also suggest (see USW Br. 7a n.2) that no black employees were prejudiced by the discriminatory shift of certain jobs from the IAM unit to the USW unit because the IAM used occupational seniority. In fact, the record appears to show that while employees transferring into the IAM unit forfeited all their seniority, employees transferring between jobs within the IAM unit retained their seniority in their old jobs; they merely did not carry it over to the new job. See J.A. 167-168; 172-173; 177-179 (no provision for forfeiture); Plaintiff's Exhs. 2, 3, 7, and 8 (entries for Norred, McBrayer, Luke, Ellis, Waltz, Parham, and Bullock). If such an employee were laid off from his new job, he apparently would be able to return to his old job with his previous seniority. Thus the record indicates that black employees who wished to transfer to IAM jobs were prejudiced by being excluded from the IAM unit. These matters require further clarification on remand, at the remedial phase.

races. See, *e.g.*, *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 346 n.28 (1977) ("[A] seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption."). The question of who is responsible for injecting the racial element may well be significant in formulating relief.[8] But where, as here, it has been shown that racial considerations affected the design of the system, it follows that the aspects of the system that continue to effectuate that racial purpose are not bona fide.[9] Here, the court of appeals properly concluded that the IAM had, for racial reasons, caused certain jobs to be excluded from certain seniority units and placed in others. Those units continued to determine employees' rights after the effective date of Title VII.[10] This was sufficient to establish that not all aspects of the Bessemer seniority system were bona fide, and to require that an appropriate remedy be provided for the effects of the discriminatory aspects.

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[8] In many cases, the relief can be designed to accommodate the congressional policy underlying Section 703(h). For example, the non-discriminatory aspects of the system, and the relative seniority among themselves of those who are not victims of discrimination, should be preserved if possible. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

[9] Indeed, those aspects of the seniority system are within the express terms of the proviso in Section 703(h): "provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *."

[10] Congress did not intend to allow an employer who continued an intentionally discriminatory employment practice past the effective date of Title VII to defend a claim by showing that the continuation was the result of inertia, not renewed racial animus. See 110 Cong. Rec. 7243 (1964) (remarks of Sen. Case) (employers are to bring their employment practices into conformity with Title VII during the period between the title's enactment and its effective date). Of course, the remedy can take into account only injuries suffered after the effective date.

Petitioners (see, *e.g.*, USW Br. 40, 44-46, 3a-4a; Pullman Br. 14) and the district court also defend the IAM's actions by saying that they were in compliance with NLRB orders. Their claim is not that the assignment of the disputed jobs was "consistent with National Labor Relations Board precedents" (see *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 356 (1977)).[11] Instead, the district court relied on the NLRB's decision to certify particular units in the Bessemer plant (see Pet. App. 34a-38a).

The Board, however, merely certifies what it believes is *an* appropriate bargaining unit; often, there are several possible appropriate units. See, *e.g.*, *NLRB* v. *Chicago Health & Tennis Clubs*, 567 F.2d 331, 334-335 (7th Cir. 1977); *Wheeler-Van Label Co.* v. *NLRB*, 408 F.2d 613, 617 (2d Cir.), cert. denied, 396 U.S. 834 (1969); *Black & Decker Manufacturing Co.*, 147 N.L.R.B. 825 (1964). Thus the Board's certification of the IAM unit does not mean that the IAM's exclusion of certain jobs was necessarily required by the National Labor Relations Act. Moreover, the Board did, against the IAM's wishes, include in the IAM unit certain jobs which were held by blacks, and the IAM promptly divested itself of those jobs. It did so by an agreement with the USW and Pullman-Standard which the Board approved, but, as respondents point out (Resp. Br. 127-128 n.92), the Board is most unlikely to inquire into an agreement acceptable to all concerned parties if there is no complaint. Moreover, we are aware of nothing in the record suggesting that the Board knew that the agreement excluded all the blacks from the IAM unit. The Board's role in this case thus does not undermine the court of appeals' conclusion that, on the IAM's initiative, certain jobs were placed in certain bargaining (and therefore seniority) units not for legitimate purposes but in order to promote racial segregation.

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[11] As we will explain (see pages 29-30 note 21, *infra*), that a system is based on bargaining units which comport with NLRB precedents does not necessarily mean that it is bona fide, although it is stronger evidence than NLRB designation of particular units.

II. THE TEST APPLIED BY THE COURTS BELOW IDENTIFIES PROPER CRITERIA FOR DETERMINING WHETHER A SENIORITY SYSTEM IS BONA FIDE

Both courts below relied on the definition of "bona fide" specified by the Fifth Circuit in *James*. See pages 4-5, *supra*. Other courts have used the *James* test as well. See, *e.g.*, *United States* v. *Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), petition for cert. pending *sub nom. Local 84, IBEW* v. *United States*, No. 80-2117; *Sears* v. *Bennett*, 645 F.2d 1365 (10th Cir. 1981), petition for cert. pending *sub nom. United Transportation Union* v. *Sears*, No. 81-221; *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981). While the form of words used in the *James* definition is not entirely helpful, we believe that it essentially directs a court to make three inquiries,[12] and that these inquiries are proper ones for a court to undertake in determining whether a system is bona fide.

The first inquiry is whether the challenged aspects of the seniority system have a disproportionately harsh impact on minorities; such an impact may create an inference that those aspects are not bona fide. The nature and magnitude of the disproportionate impact determine the strength of the inference. The second inquiry is whether those who established the seniority system, or certain features of it—generally, an employer and one or more unions—have a history of practicing, or acquiescing in, racial discrimination. If they do, an inference that certain aspects of the system are not bona fide may be justified. But because Section 703(h) protects some seniority systems that were created at a time of per-

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[12] The first factor—"whether the system *operates* to discourage all employees equally from transferring" (emphasis added)—appears to require an inquiry into disproportionate effects. The second and third factors (see pages 4-5, *supra*) refer to a background of discrimination and the business justification of the system. The final factor simply states the ultimate question of whether a discriminatory purpose entered into the design of the system.

vasive discrimination and have a disparate impact on minorities (see *International Brotherhood of Teamsters* v. *United States*, *supra*), the sponsors of a seniority system must be permitted to overcome an inference created by either of the first two inquiries by showing a sufficient non-racial business justification for the challenged aspects of the system.[13] The third inquiry is whether such a justification exists.

These inquiries parallel factors the Court has relied on in determining whether a governmental agency has violated the Equal Protection Clause by acting with a discriminatory intent, and the equal protection cases are a useful analogy. As we will explain, however, the issues are sufficiently different, and arise in such different contexts, that the principles developed for proving discrimination under the Equal Protection Clause may apply somewhat differently in determining whether a seniority system is bona fide.

A. Disproportionate impact

A seniority system, or particular features of it, may disproportionately affect minority employees in one of several ways. The IAM's maneuvers excluded every black from its seniority unit. A departmental seniority system might operate to deny blacks, but not whites, the opportunity to be promoted without losing their seniority. See pages 20-21, *infra*. Or certain aspects of a

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[13] Because respondents established (see Pet. App. 26a-28a; USW Br. 8) that the seniority system perpetuated past discrimination (see *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 349-350, quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 429, 430 (1971)), the district court properly assigned to petitioners (see Pet. App. 25a) the burden of establishing the Section 703(h) affirmative defense. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (Section 703(h) exemption for certain tests is an affirmative defense that must be established by employer); *County of Washington* v. *Gunther*, No. 80-429 (June 8, 1981), slip op. 7-9 (Section 703(h) incorporates "affirmative defenses" of Equal Pay Act); *Dothard* v. *Rawlinson*, 433 U.S. 321, 323 (1977) ("bona fide occupational qualification" exemption of Section 703(e)(1)—phrased similarly to Section 703(h)—must be proved by employer).

seniority system might discourage blacks from transferring out of the least desirable jobs. Of course, disproportionate impact cannot be considered in isolation, and only in a particularly "stark" case will it conclusively demonstrate that an aspect of a seniority system was adopted with a discriminatory purpose. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266. But in general, if an aspect of a seniority system "bears more heavily on one race than another" (*Washington* v. *Davis*, 426 U.S. 229, 242 (1976)), a court should be permitted to infer, subject to refutation, that that aspect was designed with race in mind and is therefore not protected by Section 703(h).[14]

1. A seniority system that explicitly differentiated between employees of different races would, of course, not be bona fide. See *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 355-356. But parties to a collective bargaining agreement who intend to discriminate are unlikely to use explicitly racial language; the danger is that they will use a subterfuge to achieve their ends. See *United States* v. *Board of School Commissioners*, 573 F.2d 400, 412 (7th Cir.), cert. denied, 439 U.S. 824 (1978). See also *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 135 (1976). In many cases, as in the present case, a subterfuge will be readily available, because many employers followed a policy of segregating occupations on the basis of race. In this way, job classifications provide a surrogate for race; parties intending to discriminate can simply treat "black" jobs differently from "white" jobs—as the IAM did—thus avoiding explicit racial classifications. Here there was other evidence of IAM's racial purposes, but often courts

[14] The strength of the inference will of course vary with the extent and nature of the impact. Where the challenged aspect of the seniority system affects all blacks and few whites, the inference that it was designed to discriminate against blacks will be relatively strong. Where, as in *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 356, large numbers of whites are also injured, the inference will be weaker. See *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 275 (1979).

may be unable to detect such covert classifications unless they are free to compare the impact a challenged aspect of a seniority system has on blacks' jobs with its impact on whites' jobs, and draw an inference of discrimination if the impacts are severely disproportionate.

Local No. 84, IBEW v. *United States*, petition for cert. pending, No. 80-2117, which concerned the seniority system of the Georgia Power Company, is an example. See also *Miller* v. *Continental Can Co.*, 26 Fair Empl. Prac. Cas. 151 (S.D. Ga. 1981); *Myers* v. *Gilman Paper Co.*, 25 Fair Empl. Prac. Cas. 468 (S.D. Ga. 1981). Until 1963, Georgia Power assigned all black employees and no white employees to the jobs of laborer, porter, janitor, and maid—the lowest-paying jobs in the company—and did not permit blacks to transfer to any other positions. After 1963, and continuing beyond the effective date of Title VII, Georgia Power began allowing blacks to transfer to higher-paying jobs only if they met requirements that did not apply to other transfers within the company. At the same time, Georgia Power continued to assign almost all blacks to the lowest-paying jobs; some whites were assigned to jobs as laborers but none to the other three jobs, and those few whites were promoted to higher-paying positions far more quickly than blacks.

The Georgia Power seniority system established lines of progression through which employees could advance to higher-paying jobs without loss of seniority. But, unlike other jobs, the "black" jobs of laborer, janitor, porter and maid were not in lines of progression. Thus black employees could advance to higher-paying jobs only by transferring to a new section and forfeiting their seniority. Nearly all white employees, by contrast, could be promoted without losing their seniority.[15]

This kind of seniority system is explicitly neutral, but it limits the opportunities of those in certain jobs—the "black" jobs—far more severely than those of the holders of "white" jobs. In other words, such a system attaches

[15] These facts are drawn from our response to the petition in No. 80-2117.

special disadvantages to precisely those jobs which the employer has ensured will be held exclusively or primarily by blacks. Such a pattern may not conclusively demonstrate an intention to discriminate, but it is unrealistic to suppose that no inference of discrimination can be drawn from it. The principal evidence of such a covert classification—indeed, often the only evidence—will be a severely disproportionate impact.[16]

2. In cases dealing with the definition of discriminatory intent under the Equal Protection Clause, the Court has similarly recognized that disproportionate impact is an important consideration. See, *e.g.*, *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 273; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266; *Washington* v. *Davis*, *supra*, 426 U.S. at 241-242. These cases provide additional support for using disproportionate impact to determine whether aspects of a seniority system have been designed with a discriminatory purpose. For example, the racial impact of the IAM's maneuvers was so one-sided that, considered in context, it would compel the conclusion that the IAM was discriminatorily motivated according to the principles governing proof of discriminatory purpose under the Equal Protection Clause. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266; *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Moreover, in our view, disproportionate impact should be given somewhat greater weight in determining whether a challenged aspect of a seniority system was adopted with a discriminatory intent than it receives in the equal protection context.

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[16] Here, the court of appeals also noted that the Bessemer seniority systems disproportionately affected blacks by confining them in "the least remunerative departments" (Pet. App. 10a). The court did not develop this conclusion, but this kind of disparate impact can also suggest that a system, or particular aspects of it, are intentionally discriminatory. See *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279 n.25. In *Miller* v. *Continental Can Co.*, *supra*, for example, all the "black" jobs were in a seniority unit in which the highest position paid less than all but a few of the jobs in the other, exclusively white departments.

While the Title VII question and the Equal Protection Clause question are analogous, they differ in certain important respects. When a court holds that a government action had a discriminatory purpose, it is, in general, overturning a decision made by (or in accordance with the wishes of) elected officials. By contrast, a decision holding that certain aspects of a seniority system are not bona fide need not sweep away the entire system or otherwise work a major interference with the collective bargaining process. Such a decision only requires that aggrieved individuals be given a remedy equivalent to the seniority they would have had if race had not entered into the design of the system. See pages 9-10, 15 & note 8, *supra*. Thus the cost of an incorrect decision on the bona fides of an aspect of a seniority system cannot be compared to the cost of invalidating an act of a democratically-elected body. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 776-778 (1976).

Moreover, the factual context of an examination of a seniority system will typically be quite different. As we have explained, in this case and many others a seniority system was superimposed on a rigidly segregated pattern of employment practices, making covert classifications more of a danger than they are in society at large. The " 'heterogeneity' of the Nation's population"—one of the factors which "limit[s] [the] probative value of disproportionate impact" in constitutional cases (see *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266 n.15, quoting *Jefferson* v. *Hackney*, 406 U.S. 535, 548 (1972)) will often not be reproduced on the shop floor.

Finally, if an aspect of a seniority system that has a disproportionate impact was adopted for a legitimate business purpose, it should be relatively easy for the sponsors of the system to explain that purpose, and there is nothing questionable in a court's requiring such an explanation. Compare *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (appropriateness of inquiring into reasons for actions "in a business setting")

with *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 268 n.18 ("judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government"). The public interest justifying a legislative or executive action will, however, often be a mix of the varying pressures and interests that produced a certain political outcome (see *McGinnis* v. *Royster*, 410 U.S. 263, 276-277 (1973)), making it difficult to articulate the precise justification for a measure. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 265. For these reasons, the Court should be less reluctant to require a specific justification for an aspect of a seniority system that produces a significantly disproportionate impact than it is to require such a justification under the Equal Protection Clause.

B. A history of discrimination

The district court found that the USW was principally responsible for the Bessemer seniority system and that the USW did not have a history of racial discrimination; the court of appeals did not appear to disagree with the district court's assessment of the USW's history or doubt that the USW was responsible for portions of the seniority system, but it recognized that the organization of the seniority units was partly attributable to the IAM, and that the IAM clearly engaged in discriminatory practices. This reinforced the court of appeals' conclusion that to the extent the seniority system was the result of IAM's maneuvers, it was not bona fide. In our view, the courts were correct in giving great weight to the unions' history of discrimination or nondiscrimination.

1. A history of discrimination may illuminate a disproportionate impact and heighten the suggestion that that impact was desired. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 267. If an employer or union consistently discriminated in other areas related to employees' conditions, there is, at the very least, no reason to presume

that its contemporaneous support for seniority rules that severely disadvantage blacks is nondiscriminatory and undertaken for legitimate purposes. This is particularly true when a seniority system furthers precisely the same racially discriminatory objectives that an employer or union is pursuing through other means.

The IAM's actions are, of course, a clear example. The IAM engaged in judicially-noticeable discriminatory practices and, according to its "ritual," explicitly limited its membership to whites. It then attempted, in NLRB proceedings, to exclude blacks from its bargaining unit; when that failed, it ceded the blacks' jobs to the USW. It is abstractly possible that the IAM excluded the blacks because it genuinely believed their jobs did not belong in the bargaining unit; but it makes no sense to preclude at least an inference that the IAM excluded the blacks' jobs because they were held by blacks.[17] Thus, a court would be justified in inferring that the seniority system was part of a discriminatory plan (see Fed. R. Evid. 404(b) (evidence of other wrongs admissible to show common plan or design)), just as "given the purpose to operate a dual school system one [can] infer a connection between such a purpose and racial separation in other parts of the school system." *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 467-468 (1979), citing *Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973).

2. Moreover, if an employer or a union has shown an intention to discriminate on the basis of race, there is some reason to suspect that the result of collective bargaining will reflect that intention, unless the other party to the collective bargaining relationship resists or is willing to make concessions in order to protect minority employees against discrimination. Where one party to a

[17] The Georgia Power case (page 20, *supra*) provides a somewhat similar example of an employer with a history of discrimination. Georgia Power adopted a variety of unlawful devices—discriminatory hiring and transfer practices and requirements—to bar blacks from all but the lowest-paying jobs. The seniority system, by excluding those jobs from lines of progression, served exactly the same purpose.

collective bargaining agreement has a history of discriminating on the basis of race, therefore, it is not necessary to show that the other party also actively discriminated; even indifference to racial concerns may suggest that certain aspects of the seniority system were influenced by racial motivations.

Here, the district court concluded that Pullman-Standard, which of course engaged in widespread discrimination, did not have a substantial influence on the seniority system because "although certainly affected by the process of negotiation, the seniority system under attack is essentially the product of USW aims and policies" (Pet. App. 40a).[18] Because the USW did not pursue discriminatory objectives, the court concluded that there was no reason to draw an inference that the system was not bona fide. The court of appeals analyzed the readjustment of the units with the same principles in mind, but it recognized that certain aspects of the system were the result of the aims and policies of the discriminatory IAM, which the USW—"in the interest of increased membership"—did not resist (see Pet. App. 15a-16a). It accordingly, and correctly, drew the inference that those aspects were affected by race.[19]

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[18] We do not endorse the district court's statement that in general "[a]lthough determined by collective bargaining, a seniority system may properly be viewed as the manifestation of a union objective, one which operates in opposition to and as a limitation upon the managerial powers sought by the company" (Pet. App. 40a). However true this is about the use of seniority as a criterion, there is no reason to suppose that it will be true of, for example, the division into seniority units. Indeed, elsewhere in its opinion, the district court explained the ways in which the departmental system at Bessemer was needed to serve certain management objectives. See Pet. App. 31a & n.7.

[19] Both petitioners agreed to the IAM's discriminatory maneuvers; although their complicity may have been passive, they appear to be liable for back pay. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). Moreover, we know of no evidence that, after the effective date of Title VII, either petitioner "self-examine[d] and * * * self-evaluate[d] their employment practices and * * * endeavor[ed] to eliminate" the segregative elements that were present in the seniority system. See *ibid.*; *Terrell* v.

C. Business justification

1. A seniority system is bona fide to the extent that its design is the result of the legitimate, non-racial objectives of the employer and the employees, generally represented by the union. Superficially, then, it might seem that the most straightforward way to defend the bona fides of a challenged aspect of a seniority system would be to show its connection to legitimate business purposes.

Here, the district court attempted, to a degree, to analyze the system in this way, by examining the particular requirements of the enterprise and the qualifications of employees in various occupations. See Pet. App. 31a-32a. But this approach has obvious limitations. It often requires more expertise than is available to a court. Moreover, the parties defending a seniority system will usually be able to offer some explanation for various aspects of the system; rarely will a system consist of a "helter skelter arrangement of seniority units" that can be explained only as having been "purposely molded to discriminate against black workers." See *Myers* v. *Gilman Paper Co.*, *supra*, 25 Fair Empl. Prac. Cas. at 474. Indeed, as the district court recognized (Pet. App. 31a-32a), it is not always clear what constitutes a legitimate explanation. In any but an extreme case, for example, it would be difficult for a court to reject the arguments of a craft union and an employer that a particular job in a particular plant did not belong in the craft unit; but those arguments might well be a rationalization for racial discrimination.

For these reasons, the courts below considered "industry practice" as well (see *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 356). Both the district court (Pet. App. 35a-36a) and the court of appeals (Pet. App. 11a) correctly compared Pullman-Standard's Bessemer plant to two northern Pullman-Standard plants which had a somewhat comparable range

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United States Pipe & Foundry Co., 644 F.2d 1112, 1120-1121 (5th Cir. 1981); *James* v. *Stockham Valves & Fittings Co.*, *supra*, 559 F.2d at 353-354.

of operations but a very small number of black employees. Both courts relied on the premise that racial considerations could not have affected the organization of the northern plants; thus aspects of the Bessemer seniority system which resembled those of the northern plants were very unlikely to have a racial motivation, while differences in the Bessemer plant required some further justification—a justification which the court of appeals did not find.

2. The district court, however, considered other forms of "industry practice" which, we believe, either are of very limited probative value or must be used with great care. For example, it is possible that industry practice will itself be based on discrimination. *United Transportation Union* v. *Sears*, petition for cert. pending, No. 81-221, is a particularly dramatic example.

Sears involved a railroad's seniority system, in which there were essentially two seniority units; one consisted of brakemen and several other crafts, the other of porters and chair-car attendants. See 81-221 Pet. App. A-3 to A-4, A-12. Because of hiring discrimination both before and after the effective date of Title VII, all porters and chair-car attendants were black; the other crafts were either predominantly or entirely white. This craft organization along racial lines had apparently prevailed throughout the railroad industry since the nineteenth century. See *id.* at A-3. During almost this entire period, however, porters performed essentially the same braking duties as passenger train brakemen, along with additional duties in attending to the passengers. *Id.* at A-3, A-13. A black wishing to become a porter had to pass the same rules examination as a white wishing to become a brakeman. *Id.* at A-4.[20]

[20] This Court, discussing the craft organization of the railroad industry in a related context, indicated that the only difference between the jobs of "brakeman" and "porter" were their names and the color of the persons permitted to hold them. *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 770-771 (1952). The Court explained:

> "[T]rain porters" do all the work of brakemen; * * * the government administrator of railroads during World War I

Since the only difference between porters and brakemen was their race, race was the only possible explanation for the exclusion of porters from the seniority unit that permitted transfers to other jobs without loss of seniority. Necessarily, then, this aspect of the seniority system was not bona fide. The union held liable in *Sears* emphasizes, in its petition for a writ of certiorari, that the seniority system followed traditional industry craft lines. See, *e.g.*, 80-221 Pet. 15. But where the crafts were defined in racial terms—"porter" was essentially the name given to a black brakeman (see *Brotherhood of Railroad Trainmen* v. *Howard*, *supra*, 343 U.S. at 773)—this "industry practice" obviously cannot show that the distinction between crafts was bona fide.

The racial basis of the distinction between crafts will seldom be as clear as it was in the railroad industry. But in view of the consistent exclusion of blacks from crafts—an exclusion which is "a proper subject for judicial notice" (*United Steelworkers of America* v. *Weber*, 443 U.S. 193, 198 n.1 (1979))—the fact that seniority departments follow industry-wide craft lines cannot provide assurance that the departments are not based, in part, on race. As in the railroad industry, black employees performing the same work might by placed in jobs that are given different names and then excluded from the "craft"—solely because of their race. Even where this is not the case, the pattern apparent in the IAM's actions in this case—a craft union which excluded blacks from its membership for discriminatory reasons very likely had the same reason for seeking a seniority system that discouraged blacks from transferring into jobs within the craft—appears elsewhere. *Terrell* v.

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had classified them as brakemen and had required that they be paid just like white brakemen; * * * [but] when the railroads went back to their owners, they redesignated these [black] brakemen as "train porters," "left their duties untouched," and forced them to accept wages far below those of white "brakemen" * * *.

Id. at 770-771 (footnote omitted).

United States Pipe & Foundry Co., 644 F.2d 1112 (5th Cir. 1981), seems to be an example; there the court of appeals held that all-white craft unions attempted to define bargaining units in a way that would exclude blacks and then insisted on a seniority system based on the bargaining units. See *id.* at 1118-1119. The resulting system followed craft lines; but that alone was plainly an insufficient basis to hold that it was bona fide.[21]

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[21] For similar reasons, conformity with the precedents of the NLRB or a comparable agency does not necessarily show that a unit is bona fide. In *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 356, where the Court mentioned Board precedents as a factor to be considered, it explained that the relevant precedents in that case were based on the "different duties and functions, separate supervision, and different bases of payment" that made the units "functionally distinct groups with * * * divergent interests" (*id.* at 356 n.42, quoting *Georgia Highway Express*, 150 N.L.R.B. 1649, 1651 (1965)). Sometimes, however, NLRB guidelines may fail to prevent employers', employees', and unions' discrimination from influencing the composition of a bargaining unit. For example, the Board will give some weight to traditional craft organization in an industry (see generally *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966)), which, as we have said, may be based in part on race. The railway craft units of brakeman and porter had been recognized by the National Mediation Board under the Railway Labor Act, even though they were based on race (see 80-221 Pet. App. A-12, A-69). That a federal agency was willing to recognize traditional craft or unit distinctions, even though they were based on race, at a time when private discrimination may have been legal, does not entitle a union or employer to continue to allow those distinctions to determine employees' seniority rights after the effective date of Title VII.

In any event, petitioners here do not assert that the boundaries of the IAM unit conformed to consistent NLRB practice; their claim is only that the Board designated the particular IAM unit at the Bessemer plant. As we explained (see page 15-16, *supra*), a unit designation in a particular case is less probative of bona fides than NLRB practice, and the Board's designation did not establish that the form of the IAM unit was dictated by the National Labor Relations Act. In addition, the Board sometimes explicitly considers employee preferences in designating bargaining units, holding elections among employees with a particular skill to determine if they are to be placed in a separate bargaining unit. See generally *Parke Davis & Co.*, 173 N.L.R.B. 313 (1968); *Globe*

CONCLUSION

The judgment of the court of appeals, insofar as it holds that certain aspects of the seniority system are not bona fide for the reasons discussed in this brief, should be affirmed.

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OCTOBER 1981

Machine & Stamping Co., 3 N.L.R.B. 294 (1937). Such elections were held in the plant involved in *Terrell* v. *United States Pipe & Foundry Co.*, *supra*. See *United States Pipe & Foundry Co.*, 19 N.L.R.B. 1016 (1940); *United States Pipe & Foundry Co.*, 84 N.L.R.B. 954 (1949). The elections resulted in the creation of five predominantly white craft units and one predominantly black unit. The district court and the court of appeals agreed that the elections were significantly influenced by race. See 644 F.2d at 1117. At the insistence of the white craft unions, these bargaining units were also seniority units. See *id.* at 1116. In this way, the design of the seniority system may be directly attributable to the racial prejudices of the employees, expressed through the election. Whatever the merits of the particular system at issue in *Terrell*, this further shows that NLRB certification of a bargaining unit does not make the use of that unit bona fide for seniority purposes.

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